IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 1789 OF 2004

Vishwanath Revensiddashatri Hiremath ...Petitioner

V/s.

The State of Maharashtra & Ors ...Respondents

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Mr. Subhash Jha i/b M/s. Law Global for Petitioner.
Mrs. Manjula Rao with Ms. Kokila Kalra, Advocates for Respondent Nos.2 to 5.
Mr. V.B. Konde Deshmukh, A.P.P. for the State.

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CORAM: SMT. V.K. TAHILRAMANI, J.

DATE OF RESERVING THE ORDER : 22.07.2005

DATE OF PRONOUNCING THE ORDER : 12.08.2005

P.C.:-

1. Heard both sides.

2. Through this petition the petitioner i.e. original complainant has challenged the judgment and order dated 13.5.2004 passed by the learned Additional Sessions Judge, Greater Bombay in Criminal Revision Application No.918 of 2002. By the said order the process issued against the respondent Nos. 2 to 5 came to be recalled.

3. The brief facts are that the petitioner had filed a complaint against the respondent Nos. 2 to 5 under Section 138/141 of Negotiable Instruments Act. The

said complaint was filed before the learned Metropolitan Magistrate, 28th Court at Mazgaon, Mumbai and the case was numbered as 1414/S/99. In the said case the process came to be issued against the respondents i.e. original accused under Section 138/141 of Negotiable Instruments Act. The respondents i.e. the original accused preferred an application for recalling of process before the learned Magistrate. The said application came to be rejected. Being aggrieved thereby the respondent Nos. 2 to 5 preferred a revision before the Sessions Court. By order dated 13.5.2004 the learned Additional Sessions Judge recalled the process issued against the respondents. This order dated 13.5.2004 has been challenged in the present petition.

4. It is the case of the respondents that though they were directors of Vitara Chemicals, they had resigned on 30.10.1998 and the cheque in the present case came to be issued on 10.11.1998/11/11/198. Thereafter, the cheques came to be dishonoured and the notices were issued. Thus, it was submitted that when the cause of action arose, the respondents were not in charge of the day to day affairs of the company. Reliance was placed by them on Form 32 showing that they had resigned. The annual report of the company of the year 1998-1999 also shows that the respondents had resigned as directors of the company on 30.10.1998.

5. The learned advocate for the petitioner has disputed the genuineness of Form 32 and he has submitted that no reliance can be placed on Form 32 or the annual report showing that the respondents had resigned prior to issuance of cheque. He has submitted that this fact would have to be proved by the respondents by leading evidence. In support of this contention he has placed reliance on the decision of the Supreme Court in the case of **S.V. Mujumdar and Ors. Vs. Gujrat State Fertilizers Co. Ltd. 2005 (2) Crime 141 (SC).** In the said case it was contended that the proceedings ought to be quashed on the ground that there was no material to show that the accused at the time of offence were in charge and/or responsible to the company for the conduct of the business. The High Court rejected the plea holding that the controversy was to be adjudicated at the time of evidence. The Supreme Court held that the High Court was justified in rejecting the writ petition. Thus, Mr. Jha has submitted that the contention of the accused persons that they were not in charge of the day to day affairs of the company at the time of the offence because they resigned much prior to the cheque being issued would have to be proved by them during the trial.

6. Mr. Jha also placed reliance on the decision of

the Supreme Court in the case of **Bindeshwari Prasad Singh Vs. Kali Singh (1977) 1 SCC 57.** In the said case the Supreme Court held that the Magistrate cannot review or recall any order passed by them and hence, the Magistrate erred in recalling the order passed under Section 203 and dismissing the complaint. The said decision would not be applicable to the facts of the present case because in the present case the Magistrate has not recalled the process but the Sessions Court has set aside the order issuing process.

7. Reliance was also placed by Mr. Jha on the decision of the Supreme Court in the case of **Raj Lakshmi Mills Vs. Shakti Bhakoo (2002) 8 SCC 236.** It is submitted that in the case of Raj Lakshmi Mills, the High Court had quashed the proceedings on the assumption that 'X' was not in charge of or responsible for the conduct of the business of the firm. The Supreme Court observed that at the stage of summoning when evidence was yet to be led by the parties the High Court could not on an assumption of facts come to a finding of fact that the respondent was not responsible for the conduct of the business. On this ground alone the decision of the High Court came to be set aside.

8. Thereafter, reliance was placed by Mr. Jha on the decision of this Court **dated 4.7.2005 in Criminal**

Writ Petition No. 1480 of 2004 (Prakash P. Malvankar Vs. Vishwanath Revansiddha Shastri & Anr). In the said case, it is held in case of the co-accused therein who are also co-accused of the accused in the present case that the evidence would have to be led in respect of Form 32 and it would not be proper to rely on the annexures i.e. Form 32 etc. and quash the proceedings. In this connection it may be stated that the case of the present respondents and the petitioners in Criminal Writ Petition No. 1480 of 2004 is not the same.

9. As far as the respondent Nos. 3 to 5 are concerned they had filed Criminal Writ Petition No. 1024 of 2003 before this Court. The said petition came to be preferred as the Sessions Court rejected their prayer for quashing of process. The contention of the petitioners therein i.e. respondent Nos. 3 to 5 in the present petition was that they were not in charge of the day to day affairs of the company when the cause of action arose. As they had resigned prior to the cheques being dishonoured, they could not be held liable. Reliance was placed on Form No.32 in support of their contention that they had resigned when the cause of action arose. The said Writ Petition came to be allowed by order dated 13.2.2004. In the said writ petition the High Court while referring to yet another proceedings, held that factum of resignation of the applicants in the said

Writ Petition already stood determined and therefore, that should have been accepted by the Sessions Court. Therefore, the proceedings against respondent Nos.3 to 5 were quashed by this Court or in other words the process issued against respondent Nos.3 to 5 was recalled. As a result thereof, as far as respondent Nos.3 to 5 are concerned, it can now be said that the factum of their resignation from the said Company stands determined. The position as far as the petitioner in writ petition No.1480 of 2004 is not similar as the factum of resignation has not been determined by the High Court or any other Court, hence, no reliance can be placed on the said decision.

10. In respect of respondent No.2 it may be stated here that in the decision in the case of **D.B. Mehta & Ors. Vs. Ramesh Rikhavdas Shah reported in 2004 (3) Mh.L.J. 3 (W.P. No.1024 of 2003),** the High Court has also made observations in relation to respondent No.2 herein i.e. Vijay M. Bhatia. The very Form 32 which has been relied upon by the respondent Nos.3 to 5 also contains the name of Vijay M. Bhatia i.e. the respondent No.2 in the present petition. This Court has observed in the decision relating to Writ Petition No.1024 of 2003 that perusal of Form 32, clearly shows that all the four directors (respondent Nos. 2 to 5) had resigned on 31.10.1998 and that the Managing Director had

furnished particulars of their resignation to the Registrar of companies in the prescribed Form 32 on 30.11.98. This Court has further observed in relation to the case of respondent No.2 that the fact of resignation of Vijay M. Bhatia stood determined by revisional Court. Thus, this Court has relied on the said Form 32 which was in respect of all four respondents i.e. the respondent Nos. 2 to 5 and quashed the proceedings in relation to respondent Nos. 3 to 5. Thus, it is seen that it is accepted by this Court in Writ Petition No. 1024 of 2003 that all four respondents i.e. respondent Nos. 2 to 5 had resigned on 30.10.1998. In the present case also the respondent Nos. 2 to 5 have placed reliance on the very same Form 32 which has been accepted by this Court in Writ Petition No. 1024 of 2003. It may be stated here that Form No.32 in respect of accused persons in writ petition No.1480 of 2004 is different from Form 32 in respect of present respondent Nos.2 to 5.

11. Useful reference may be made to the decision of the Supreme Court in the case of **Suresh Prabhakar Prabhu Vs. Mira Wilma Pimenta & anr. in its decision dated 29.8.2002 in Criminal Appeal No.879, 880, 881, 882 and 883 of 2002.** The appellant in the said case was also facing prosecution Section 138 of Negotiable Instruments Act. The appellant No.2 was the director of the company. The prayer for quashing

of the proceedings was made in 23 proceedings against the appellant. All 23 Criminal applications were heard and decided by the High Court. Out of which in 18 applications, the High Court came to the conclusion that Shri. Suresh Prabhu had in fact resigned as Director on 6.5.1996 and the cheques had been issued after he had ceased to be the director of that company. In the remaining five applications, the proceedings were not quashed inasmuch as the Single Judge observed that the complainant had disputed the factum of resignation of Suresh Prabhu on the date when the cheques were issued. The Supreme Court has held that the findings of the High Court in 18 cases pertaining to the same company that Suresh Prabhu had resigned on 6.5.1996 and was not the director on the date when the cheques were issued had become final. In such case it was not proper for the High Court to permit in respect of same company five other cases to proceed merely because the respondents had disputed certain facts. The Supreme Court further observed that whether Suresh Prabhu was the director of the company in November/December 1996 is a question of fact. That question of fact stood determined by the High Court when it allowed the 18 Criminal applications by holding that he had resigned, which resignation had become effective long before the issuance of the cheques in question. The Supreme Court held that once these findings had been recorded, the High Court ought to have applied the

same while considering other applications, notwithstanding, the non acceptance of the fact by the respondents.

12. It is the specific case of the respondents that when the cheques were issued they were not the directors of the company. Therefore, when the cause of action arose, they were not the directors of the company and hence they cannot be prosecuted. In the present case also the fact that the respondent Nos. 2 to 5 were not the directors of the company after 30.10.1998 stood determined by the High Court in Criminal Writ Petition No.1024 of 2004. Reliance is placed on the very same Form 32 in the present case. In such case, it would not be necessary for respondent Nos. 2 to 5 to prove the said fact during the course of trial. From the decision in the writ petition No.1024 of 2004, it is clear that on the date when the cheque was issued, the respondent Nos.2 to 5 were not directors of the company. All these aspects have been taken into consideration by the learned Sessions Judge when he recalled the process issued against the respondents. The said order is perfectly just, legal and proper. hence, no interference is called for.

13. Writ petition is disposed of.

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